2005-2006 BTG FEDERAL UPDATE
Cases since Outline Submitted

I. CIVIL LITIGATION AND PROCEDURE

A. Jurisdiction

Marshall v. Marshall, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1131904 (5/1/2006). The federal district court could assert jurisdiction over Anna Nichole Smith's tortious interference counterclaim against the claim her deceased spouse's son filed in her bankruptcy proceedings as resolution of the claim did not involve the administration of the estate or probate of the will, subjects reserved to state court jurisdiction.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, ___ U.S. __, 126 S. Ct. 1503 (2006). State-law holder class action claims are preempted by the Securities Litigation Uniform Standards Act of 1998.

Carlson v. Arrowhead Concrete Works, Inc., ___ F.3d ___, 2006 WL 1007904 (8th Cir. 4/19/2006). Because denial of a motion to dismiss was based on lack of federal subject matter jurisdiction, the fact that denial of the motion to dismiss preceded the remand portion of the court's order did not make the prior portion severable, rendering denial of the motion appealable under 28 U.S.C. § 1961. Remand orders based on lack of subject matter jurisdiction are not appealable.

Conwed Corp. v. Union Carbide Corp., ___ F.3d ___, 2006 WL 995715 (8th Cir. 4/18/2006). Asbestos case was split into disease groups for purposes of trial; the first trial consisted of mesothelioma claims only. The jury verdict in the first trial did not preclude plaintiff from litigating the adequacy of Union Carbide's warnings for the lung cancer claims, the second case tried, as evidence concerning lung cancer and asbestosis claims was not presented nor instructed on in the first jury trial.

T.L. v. United States, ____ F.3d ____, 2006 WL 871072 (8th Cir. 4/6/2006). Under the Federal Tort Claims Act, the statute of limitations is a jurisdictional prerequisite and a medical malpractice claim by the teenage mother of a baby who sustained hypoxic brain damage during birth accrued when the mother was told this had occurred, not eighteen months later when it was determined her daughter had cerebral palsy.

Ace Prop. & Cas. Ins. Co. v. FCIC, 440 F.3d 992 (8th Cir. 2006). Although 7 U.S.C. § 6912(e) is non-jurisdictional, group of insurers failed to show they fell within an exception to the requirement that administrative remedies be exhausted before bringing suit against the FCIC for breach of contract, duress and unjust enrichment which allegedly resulted from the agency's implementation of two statutes which eliminated and/or capped administrative fees the companies could retain.

Wilkinson v. United States, 440 F.3d 970 (8th Cir. 2006). Prospective Indian heirs suffered "injury in fact" sufficient to confer Article III standing when they were deprived of possessory interests in leased allotments when employees of the Bureau of Indian Affairs (BIA) leased the land after the Farm Service Administration sent BIA (after the death of the owners) notices requesting payments on mortgage loans, but never sent/provided notice of default on the loans.

Mountain Pure v. Turner Holdings, 439 F.3d 920 (8th Cir. 2006). A state court's dismissal of plaintiff's tort claims without prejudice preserved the issue for litigation in federal court and res judicata did not bar plaintiff from refiling those claims.

Johnson v. Woodcock, ____ F.3d ____, 2006 WL 925427 (8th Cir. 4/11/2006). Past business relationship between plaintiff and defendant in Minnesota was insufficient to confer personal jurisdiction over defendant when plaintiff brought a claim for royalty payments under a new contract (to which she was not a party) for revisions to a book for which they had a prior contract twenty years earlier. Phone and mail contacts between the parties and contacts between defendant and a publisher in Minnesota were too attenuated and/or random.

Steinlage v. Mayo Clinic Rochester, 435 F.3d 913 (8th Cir. 2006). State of citizenship of court-appointed trustee governed for purposes of diversity jurisdiction in wrongful death case.

B. Procedure

Bostic v. Goodnight, ____ F.3d ____, 2006 WL 1061775 (8th Cir. 4/24/2006). A party's objection to the court reserving a self-dealing claim for equitable consideration was based on "the potential for double damages" and not on Seventh Amendment right to jury trial; therefore, jury trial was waived.

Stoneridge Investment Partners v. Scientific-Atlanta, Inc., ___ F.3d ___, 2006 WL 925354 (8th Cir. 4/11/2006). In securities fraud class action, denials of plaintiffs' post-dismissal motions to reconsider dismissal order and for leave to amend complaint were not an abuse of the court's discretion: court reviewed the cases plaintiffs complained were overlooked or misapplied and analyzed them differently than plaintiffs and proposed amended pleading would have been futile.

Moran v. Clarke, ___ F.3d ___, 2006 WL 925440 (8th Cir. 4/11/2006). After plaintiff's attempt to strike all African American panel members resulted in a Batson challenge by defendants, plaintiff exercised peremptory challenge against one African American juror because he had memory of the beating incident involved in the case. Plaintiff's "race-neutral" reason for challenging the final African American juror because he had no memory of the incident, seen as inconsistent with the previous challenge, could be proof the reason given for the strike was pretextual. That the court did not request proof probative of pretext from defendants before denying the strike did not warrant a new trial where race was a factor in the case from the beginning.

Joshi v. St. Luke's Hosp., 441 F.3d 552 (8th Cir. 2006). "Particularity" requirement when pleading fraud under Fed. R. Civ. P. 9(b) requires pleading of time, place, content of false representations, details of alleged fraudulent acts, including when they occurred, "who engaged in them, and what was obtained as a result." Plaintiff's general allegations that all billings for anesthesia services over a sixteen-year period require at a minimum "some representative examples," which were not present in the complaint; proposed amendments were not based on personal knowledge and were untimely. Finally, as a matter of first impression, the circuit rejects the suggestion of relaxing the pleading requirements to permit early discovery in an FCA *qui tam* action.

United States v. Metro. St. Louis Sewer Dist., 440 F.3d 930 (8th Cir. 2006). In CERCLA action, because report submitted in support of intervenor's motion to alter or amend judgment under Fed. R. Civ. P. 59(b) was based on facts known to or accessible by intervenor before a consent decree was entered, it did not qualify as new evidence.

City of St. Joseph v. SW Bell Telephone, 439 F.3d 468 (8th Cir. 2006). A post-deposition affidavit from a key witness filed the same day as plaintiff's resistance to a motion for summary judgment was stricken as being a "sham" affidavit; the court found statements clearly inconsistent with the witness' deposition testimony were present in the affidavit and the witness never claim he was confused or needed to clarify statements made during his deposition; also the timing of the affidavit was "highly suspicious."

Robinson v. Terex Corp., 439 F.3d 465 (8th Cir. 2006). Because nonmoving party did not request a Rule 56(f) delay to complete discovery to resist a motion for summary judgment, the court did not abuse its discretion in ruling on the summary judgment motion before discovery was concluded.

Stricker v. Union Planters Bank, N.A., 436 F.3d 875 (8th Cir. 2006). Leave to file a second amended complaint was denied as plaintiffs did not have standing as individuals seeking recovery to sue on a breach of fiduciary duty claim against corporate directors.

Plubell v. Merck & Co., 434 F.3d 1070 (8th Cir. 2006). For purposes of removal under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), a new action was not deemed commenced when a class representative was replaced by another individual; the amended pleading naming a new class representative was held to relate back to the original petition; furthermore, the purpose of CAFA is not to confer a right to be in federal court.

C. Evidence

Garner v. Mo. Dep't of Mental Health, 439 F.3d 958 (8th Cir. 2006). Testimony from employer concerning an unsubstantiated allegation that plaintiff had received money from a patient's Social Security check in violation of the rules of the center was offered to explain why she had been suspended and an investigation commenced, not to prove the truth of the matter asserted, and thus was properly admitted as proof of the employer's state of mind.

Miller v. Baker Implement, 439 F.3d 407 (8th Cir. 2006). Trial court was not required to hold a Daubert hearing where expert qualification issues and reports were fully briefed by the parties, satisfying the "opportunity to be heard" requirement. Further, its *sua sponte* Daubert analysis taken in considering plaintiff's motion to make late designation of third expert was permissible as there was an adequate record based on the previous Daubert motions with respect to plaintiff's first two experts.

Smith v. Tenet Healthsystem SL, 436 F. 3d 879 (8th Cir. 2006). Plaintiff's medical, psychiatric and Social Security records in medical malpractice case were relevant to defendant doctors' theory that plaintiff's above-knee amputation was caused by "the cumulative trauma" of decades of knee problems, as evidenced in the records, and court properly conducted a Rule 403 weighing of the evidence. Plaintiff also failed to present expert medical testimony to establish his claim that failure to comply with infection-control policies caused the amputation -- *res ipsa loquitur* does not apply because "amputations regularly occur without someone's negligence."

D. Judgments

Ripplin Shoals Land Co. v. US Army Corps of Engineers, 440 F.3d 1038 (8th Cir. 2006). Prior court orders in a related case concerning developer's access to island on the White River did not bar the developer from submitting, or the Corps from considering, a new permit application for a different project to improve the developer's access.

Kforce, Inc. v. Surrex Solutions Co., 436 F.3d 981 (8th Cir. 2006). Personnel staffing company first sued its employee who left the company to go work for a competitor, in violation of a non-compete agreement. The case settled and a final judgment without attorneys' fees was entered. The company then filed a federal lawsuit against its competitor, seeking damages for tortious interference with contract, conspiracy to breach contract and violation of Missouri trade secrets law, also claiming attorneys' fees for enforcement of the non-compete in the first lawsuit. In dismissing the second lawsuit, the court noted that the employee's breach of the non-compete, which was independent of the competitor's conduct, caused the same damages as claimed against the competitor and violated state law prohibiting double recovery for injury arising from the same course of action.

II. CRIMINAL LAW

A. Criminal Acts

Scheidler v. NOW, ___ U.S. ___, 126 S. Ct. 1264 (2006). The Court held the Hobbs Act did not apply to violent conduct by anti-abortion groups against abortion clinics as the violence involved was unrelated to robbery or extortion.

United States v. Bell , ___ F.3d ___, 2006 WL 1083955 (8th Cir. 4/26/2006). Reviewing the question whether a state law conviction for second-degree burglary of a commercial establishment is a "crime of violence," the circuit confirms its prior holdings.

United States v. Montgomery, ___ F.3d ___, 2006 WL 1061783 (8th

Cir. 4/24/2006). Although defendant's father signed the ATF forms and paid for multiple handguns, that defendant carried the guns to the car and rode in the car with them made him ineligible for an innocent or transitory possession defense, particularly since it was defendant who had made multiple trips to the pawn shop in advance of the purchase.

United States v. Lopez, ___ F.3d ___, 2006 WL 987987 (8th Cir. 4/17/2006). The circuit rejects use of the "slight evidence" rule historically used in this circuit to prove conspiracy: "The correct legal statement is that a defendant may be convicted for even a minor role in a conspiracy, so long as the government proves beyond a reasonable doubt that he or she was a member of the conspiracy."

United States v. Poe, 442 F.3d 1101 (8th Cir. 2006). Justification as a defense to a felon-in-possession charge did not apply where defendant not only took his girlfriend's gun after she pointed at him during a fight, but brought it back to her apartment the next morning, a long enough period of time that any threatened harm was no longer imminent and defendant could have disposed of or abandoned the gun at any time, providing reasonable alternatives to possession.

United States v. Livingston, 442 F.3d 1082 (8th Cir. 2006). A state law conviction for breaking or entering a vehicle was not a violent felony under the Armed Career Criminal Act (ACCA) because the offender was not required to operate the vehicle.

United States v. Mugan, 441 F.3d 622 (8th Cir. 2006). In child pornography case involving defendant's 13-year-old daughter as a victim, that defendant stored sexually explicit images on a digital memory card strongly supported a connection between intrastate child pornography and interstate commerce as the images could have been readily offered on the national market.

United States v. Idriss, 436 F.3d 946 (8th Cir. 2006). This case involved the crime of money laundering in its literal meaning: Currency which had been "blackened" was "altered" under the meaning of the statute prohibiting possession of altered U.S. currency.

United States v. Staples, 435 F.3d 860 (8th Cir. 2006). Because there was no evidence defendants charged under the bank fraud statute, 18 U.S.C. § 1344, intended to defraud the banks on whose accounts checks were written and because there was no evidence the banks owned the funds at issue, convictions of two defendants could not stand.

B. Procedure

Oregon v. Guzek, ____ U.S. ____, 126 S. Ct. 1226 (2006). In this death penalty case, after defendant's sentence was vacated for a third time, defendant sought to introduce new alibi testimony from his mother during the sentencing proceedings. The Court held the state could constitutionally limit innocence-related evidence at a sentencing proceeding to that introduced at the original trial, but left open the door to admission as impeachment evidence on remand.

United States v. Morales, ___ F.3d ___, 2006 WL 1083954 (8th Cir. 4/26/2006). Although only an initial meeting to undertake a methamphetamine transaction took place in Sioux City, Iowa and all sales and contacts thereafter took place across the river in Nebraska, venue for drug charges was proper in the Northern District of Iowa.

United States v. Timley, ____ F.3d ____, 2006 WL 845600 (8th Cir. 4/3/2006). Statement in warrant application that a detective, rather than a concerned citizen, had watched defendant and ran a background check, did not affect probable cause nor establish entitlement to a Franks hearing. Further, there was sufficient information regarding two trash pulls to support issuance of the warrant, even if the detective's statement was not considered.

United States v. Salgado-Campos, 442 F.3d 684 (8th Cir. 2006). Denial of defendant's request to extend the time for filing pretrial motions was not an abuse of the court's discretion: although counsel was substituted, the request for extension came nearly two months after substitute counsel's appearance and three months after the deadline had expired and there was no showing that discovery materials were unavailable to substitute counsel.

United States v. Meyer, 439 F.3d 855 (8th Cir. 2006). A request to expunge a criminal record based solely on equitable considerations is beyond the subject matter jurisdiction of the court. In this case, defendant pled guilty to a misdemeanor information of failure to file income tax returns and completed his sentence. He subsequently took employment in the securities industry at an institution insured by the FDIC, which restricted employment of individuals with certain criminal offenses. Although the government agreed with the expungement request, it later appealed based on lack of subject matter jurisdiction.

United States v. Gamboa, 439 F.3d 796 (8th Cir. 2006). Indictments must be filed within thirty days of arrest or service of summons, unless the time is extended "because the arrest occurs at a time such that is unreasonable to expect return and filing of the indictment" within the thirty-day period or because the facts are unusual or complex. Defendant was arrested on complaint on 5/31; a federal grand jury was in session on June 4 and 5, but the case was not presented then and the day before defendant's preliminary hearing on June 11, the government filed a motion for extension of time to file an indictment, claiming it did not have sufficient time to prepare the case for the grand jury based on the timing of the arrest. The court did not err in granting the motion as the arrest was close in time to expiration of the grand jury session; furthermore, defendant was not entitled to prior notice of the government's intent to file the request for extension.

United States v. Thunder , 438 F.3d 866 (8th Cir. 2006). In the absence of a hearing or finding that closure of a courtroom during the testimony of sexually-abused children "preserve[d] some higher interest," the court erred in closing the courtroom during their testimony.

United States v. Boone, 437 F.3d 829 (8th Cir. 2006). After the government had rested its case in a felony murder/armed robbery trial, counsel for one of the defendants sought to have a grand jury alibi witness declared unavailable so portions of her grand jury testimony could be admitted -- the witness was found and recanted her grand jury testimony, leading the government to move to reopen its case-in-chief before defendants had proceeded. Because counsel had an opportunity, albeit brief because the witness terminated the interview shortly after it started, to interview her in advance and to cross-examine the witness, it was not an abuse of discretion to grant the government's motion to reopen.

United States v. Bordeaux, 436 F.3d 900 (8th Cir. 2006). Collective packaging of drugs and canisters in violation of a pretrial order to identify them separately did not taint the proceedings where the court ordered the items to be re-numbered in the presence of the jury and to be separately admitted and where the jury knew the collective packaging had been done by the person collecting the evidence.

United States v. Obasi, 435 F.3d 847 (8th Cir. 2006). Decision by the chief circuit judge to grant only $2,500 to fund investigative services in a case involving mail and wire fraud and money laundering is not appealable because it is made in an administrative capacity and not as a judicial function; to the extent district court's determination on § 3006A request was reviewable, defendant's request was not sufficiently specific to justify the amount of funds requested.

United States v. Liner, 435 F.3d 920 (8th Cir.), cert. dismissed, 126 S. Ct. 1673 (2006). In a case involving charges of wire fraud and money laundering, defendant made a request for transmittal of letters rogatory in order to depose a Swiss citizen to show defendant had invested monies in a legitimate investment program in Switzerland; however, the request was denied when defendant offered no evidence to support his claim.

United States v. McMorrow, 434 F.3d 1116 (8th Cir. 2006). Defendant's waiver of a twelve-person jury in writing and orally was voluntary -- the trial court advised defendant of his right to a twelve-person jury; that defendant felt he had to accept a ten-person jury or face imprisonment with inadequate medical care did not "undermine the voluntariness of his stipulation."

United States v. Denton, 434 F.3d 1104 (8th Cir. 2006). Trial judge was not required to recuse himself with respect to post-trial/pre-sentencing competency hearing: the fact the judge formed an opinion of defendant's competency, if any, during trial did not display the requisite "deep-seated favoritism or antagonism;" further, scheduling of the sentencing hearing immediately following the competency hearing was not evidence of bias or prejudice.

C. Search and Seizure

Georgia v. Randolph, ___ U.S. ___, 126 S. Ct. 1515 (2006). Officers may not conduct a warrantless search of a premises in the face of "disputed permission" from co-tenants.

United States v. Grubbs, ___ U.S. ___, 126 S. Ct. 1494 (2006). The Fourth Amendment's particularity requirement does not require that conditions precedent to execution of an anticipatory warrant be set out in the warrant, only "the place to be searched" and "the persons or things to be seized."

United States v. Rodriguez-Lopez, ___ F.3d ___, 2006 WL 1061778 (8th Cir. 4/24/2006). Although defendant may have had a defense to a prosecution for failure to signal a turn when he exited the highway followed by a gravel truck, where the officer reasonably believed defendant's failure to signal a turn was in violation of Iowa law, a stop of defendant's vehicle did not violate the Fourth Amendment.

United States v. Weston, ___ F.3d ___, 2006 WL 783377 (8th Cir. 3/29/2006). Officers' entry onto the curtilage of defendant's mobile home, after entering through an unlocked gate, to announce

their presence and seek consent to search for stolen vehicles, was not unreasonable and was made in good faith "in furtherance of a legitimate law enforcement objective." Therefore, no Fourth Amendment violation occurred.

United States v. Green, 442 F.3d 677 (8th Cir. 2006). Without deciding whether the initial stop of a vehicle in which defendant was a passenger was legal, the circuit finds that the driver's consent to a search of the vehicle (which resulted in the discovery of a baggie of crack cocaine under the passenger seat) purged any taint of illegality.

United States v. Elam, 441 F.3d 601 (8th Cir. 2006). Where individual who rented home consented to search of premises and in defendant's presence provided a key and unlocked a locked file cabinet in which a firearm linked to defendant was found, without objection by defendant, officer could reasonably believe the renter had authority to consent to the search.

United States v. Garcia, 441 F.3d 596 (8th Cir. 2006). After defendant was observed at a known drug house acting suspiciously while attempting to conceal something in a pants pocket, officer followed his truck to a church parking lot and after defendant got out of it, approached defendant and asked for identification and for consent to search the truck. No investigatory stop occurred as a result of the officer approaching defendant and even if it did, it was justified under the circumstances of the officer's prior observations.

United States v. Stevens, 439 F.3d 983 (8th Cir. 2006). There was probable cause for issuance of a "no-knock nighttime" search warrant where a reliable CI told officers he had observed drugs and guns in defendant's residence within the past three days and surveillance provided further information that drug trafficking foot traffic appeared to take place late at night; there was a high risk that a sawed-off shotgun might be used if officers knocked and announced; the presence of four individuals in the residence at the time the warrant was executed instead of the two expected by officers made the circumstances even "more exigent."

United States v. Roberson, 439 F.3d 934 (8th Cir. 2006). While conducting surveillance of a residence prior to executing a valid search warrant based on observation of drug trafficking activity by police officers and a reliable CI, officers observed defendant leaving the house, driving to a grocery store parking lot, entering another car for less than a minute but not the store, then driving back to the house. Under the totality of the circumstances, officers reasonably could believe a drug transaction had occurred.

United States v. Warford, 439 F.3d 836 (8th Cir. 2006). Affidavit which contained information concerning defendant's marijuana farming and sale operation gained from face-to-face interview with defendant's daughter and son-in-law was sufficiently reliable and detailed and contained many independently verifiable facts to support probable cause finding, even though daughter's credibility was suspect as she was estranged from her father due to past sexual abuse.

United States v. Cortez-Palomino, 438 F.3d 910 (8th Cir. 2006). Officer's observation of green cellophane-wrapped bales under the open bed cover of the back of pickup stopped for speeding, as well as the odor of axle grease, gave probable cause for warrantless search of pickup.

United States v. Simpson, 439 F.3d 490 (8th Cir. 2006). Although officers initially did not have probable cause or reasonable suspicion to seize defendant, the chase which preceded that seizure, during which defendant discarded ammunition and an assault rifle, was lawful; therefore, that the firearm/ammunition were not recovered until after the unlawful seizure did not render the evidence inadmissible because defendant still voluntarily relinquished control over the property.

United States v. Barker, 437 F.3d 787 (8th Cir. 2006). Information from a motel employee (of a motel known for criminal activity), who observed defendants unloading several firearms into their room and overheard them planning a meeting, was sufficient to give officers reasonable suspicion to conduct a Terry stop of defendant when he eventually answered the door of his motel room (after officers knocked several times).

United States v. Perry, 437 F.3d 782 (8th Cir. 2006). Consent to search given by defendant with lengthy criminal record and experience with police investigations, given while he was not chemically impaired, was voluntary; prior illegal search of a vehicle within the curtilage of his residence did not taint consent given to search the residence.

United States v. Caswell, 436 F.3d 894 (8th Cir. 2006). Although informant's information in affidavit for search warrant predated defendant's arrest by two months, the information was not stale as defendant admitted purchasing multiple boxes of Sudafed and having methamphetamine and Coleman fuel in his car at the time of arrest.

United States v. Morris, 436 F.3d 1045 (8th Cir. 2006). Although breach of an outer screen door prior to knock-and-announcement was not reasonable under the Fourth Amendment, it did not taint the lawful "second-search," which occurred after the interior door was breached ten seconds following knock-and-announce, because nothing was found in the "first search" between the screen and outer doors.

D. Fifth Amendment

United States v. Brave Thunder, ___ F.3d ___, 2006 WL 1061780 (8th Cir. 4/24/2006). During the course of an investigation of tribal financial transactions defendant told authorities she had not signed a consultant agreement nor did she recall being paid pursuant to one, even though records showed payments being made to her bank account pursuant to those agreements and a handwriting analyst testified it was "highly probable" defendant's signature was on the agreement. In response to her argument that the government did not prove her statements that she did not remember were false, the court noted the relevant evidence and noted "there is no constitutional right to provide a false answer."

United States v. Ollie, 442 F.3d 1135 (8th Cir. 2006). Where at his parole officer's direction defendant reported to chief of police to be interviewed about a handgun found in an apartment he shared with his girlfriend, the chief did not advise defendant he could terminate the interview although he told defendant he was not under arrest, and the interview took place in a "police-dominated atmosphere," it was a custodial situation which required administration of Miranda warnings before questioning defendant. In a question-first interrogation situation, the government has the burden of proving a failure to administer warnings before questioning was not a deliberate attempt to avoid Miranda.

E. Due Process/Evidence

Holmes v. South Carolina, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1131853 (5/1/2006). Exclusion of defendant's evidence of third-party guilt in the face of strong forensic evidence by the government violates federal constitutional rights because such a rule evaluates the strength of only one side's evidence.

United States v. Washburn, ___ F.3d ___, 2006 WL 1028422 (8th Cir. 4/20/2006). In a case involving charges of wire fraud and money laundering, jury instruction which used the term "victims" instead of "alleged victims," although not as precise, was not prejudicial to defendant's rights as the instructions clarified the government's burden of proof on the elements of the crime.

United States v. Seifert, ___ F.3d ___, 2006 WL 1007901 (8th Cir. 4/19/2006). Proper foundation for admission of digitally enhanced video included expert testimony detailing each step of the enhancement process.

United States v. Wintermute, ___ F.3d ___, 2006 WL 925436 (8th Cir. 4/11/2006). Defendant's proposed expert testimony concerning the impact defendant's false statements would have made in the decision-making process on an Application for Change in Control submitted to the Office of the Comptroller of Currency misrepresented the government's burden in proving materiality: the government only needed to show the statements were capable of influencing the decision, not that they actually did. Therefore, exclusion of the testimony was not an abuse of discretion.

United States v. Mahasin, 442 F.3d 687 (8th Cir. 2006). Court's order that defendant be restrained in leg irons, arm irons, shackles and stun belt during trial was not an abuse of discretion -- defendant had been convicted of attempted murder of a government witness, assaulted a deputy sheriff and fellow inmate, assaulted a federal prosecutor in a courtroom in the same district and made threats to his CJA counsel. A screen was set up between defendant and the jury so they could not observe his restraints and defendant voluntarily showed the jury his shackles during closing arguments.

United States v. Spencer, 439 F.3d 905 (8th Cir. 2006). State law enforcement officers were not bound by the requirement of Fed. R. Crim. P. 41 that a defendant be given a copy of the search warrant attachment describing the property to be searched when a warrant is executed; the search warrant was issued by the state court and executed by state officers; therefore, exclusion of the evidence for violation of the rule was not required.

United States v. (Willie) Johnson, 439 F.3d 947 (8th Cir. 2006). Evidence from a witness concerning his past drug dealings with defendant was admissible to show defendant's intent to enter into a conspiracy to distribute drugs; the prior bad acts were similar in kind and time to the crimes charged.

United States v. Johnson, 439 F.3d 884 (8th Cir. 2006). In case involving charges of possession of child pornography, evidence that defendant possessed stories about the rape of young girls should not have been admitted as Fed. R. Evid. 404(b) precludes propensity evidence; because the evidence against defendant was not otherwise "overwhelming," admission of the evidence could have influenced the jury and therefore it was not harmless error to admit the stories.

United States v. Littrell, 439 F.3d 875 (8th Cir. 2006). Prosecutor's statements during closing argument, in which he seemed to vouch for the government's witnesses and miscalculated the amount of methamphetamine shown in the evidence, were more properly considered a review of the evidence behind which the prosecutor did not put his personal reputation, only suggested reasons those witnesses might be found more credible; that his calculation of drug quantity was incorrect did not prejudice defendant as the jury was instructed arguments were not evidence.

United States v. Voegtlin, 437 F.3d 741 (8th Cir. 2006). Co-defendant's testimony concerning defendant's prior drug dealings was admissible to show defendant's "knowledge of the purpose of the conspiracy [to manufacture methamphetamine]." Coupled with limited instruction and the fact that the prior acts were similar in kind and close in time to those charged in the conspiracy, no abuse of the court's discretion occurred.

United States v. Kelly, 436 F.3d 992 (8th Cir. 2006). In a felon-in-possession case, the trial court was not required to determine the competency of a seven-year-old witness who would not testify when questioned about his father's participation in a shooting incident. Further, admission of the child's previously tape-recorded testimony as a prior inconsistent statement under Fed. R. Evid. 613(b) after he refused to testify further was not an abuse of discretion: the child had an opportunity to explain his refusal and defendant to cross-examine him.

United States v. Lewis, 436 F.3d 939 (8th Cir. 2006). Prior statements by defendant and a witness were properly excluded as hearsay even though both testified at trial because the statements were offered for the truth of the matter asserted.

F. Sentencing

United States v. Cadenas, ___ F.3d ___, 2006 WL 1083957 (8th Cir. 4/26/2006). In entering sentence on illegal re-entry conviction, the court considered defendant's evidence on the conditions causing him to leave the country, but also the evidence that defendant failed to apply for asylum and his family could travel to the United States to avoid danger.

United States v. Pugh, ____ F.3d ____, 2006 WL 1061782 (8th Cir.

4/24/2006). Attorney who submitted *pro se* a false discovery plan in preparation for an evidentiary hearing on the amount of restitution he owed under a 1997 criminal conviction was sanctioned with an order of censure and recommendation to the state in which he practiced that he never be allowed to practice law again.

United States v. Smith, ___ F.3d ___, 2006 WL 1007891 (8th Cir. 4/19/2006). Pre-Blakely sentencing of defendant under mandatory guidelines was plain error which affected his substantial rights as record at sentencing indicated court would have sentenced below the bottom of the guideline range.

United States v. Fowler, ___ F.3d ___, 2006 WL 987948 (8th Cir. 4/17/2006). Government's advocacy of a career-offender enhancement, in spite of a promise to recommend calculation of sentence based on an offense level which did not include the enhancement, was a material breach of the plea agreement, requiring remand for determination of the appropriate remedy.

United States v. Bueno, ___ F.3d ___, 2006 WL 987984 (8th Cir. 4/17/2006). Downward departure based on defendant's argument he was a minimal participant in drug possession case was inappropriate as defendant did not offer evidence of "the relative culpabilities of other participants in the offense;" downward departure based on aberrant behavior (first offense) was also an abuse of discretion as the offense required planning by defendant and was carried out over a number of days; family circumstances departure was also unwarranted as there was no showing that defendant's spouse's conditions of lupus and rheumatoid arthritis was life threatening or that his care was a necessary part of her treatment.

United States v. Givens, ___ F.3d ___, 2006 WL 925285 (8th Cir. 4/11/2006). In bank fraud case, departure decision sentencing defendant to time served when he had served no time and five years of supervised release, including a year of house arrest, was an abuse of discretion: defendant's post-offense rehabilitation running a cattle operation for his rural agricultural community and reporting of the crime to the bank himself was not extraordinary; case remanded for resentencing.

United States v. Webster, 442 F.3d 1065 (8th Cir. 2006). In the face of defendant's objections to facts in the PSR concerning OWI offenses, the government was obliged to introduce documentary evidence supporting the fact of prior convictions, including charging documents, plea agreements, transcripts of pleas or similar judicial records.

United States v. Eastin, ___ F.3d ___, 2006 WL 851720 (8th Cir. 4/4/2006). In reaching a conclusion a state court conviction was a violent felony under the ACCA, the sentencing court properly considered a state court indictment, which described how the crime involved conduct with defendant's sixteen-year-old daughter, to determine the nature of an incest conviction under a state statute which criminalized both violent and non-violent conduct.

United States v. High Elk, 442 F.3d 622 (8th Cir. 2006). Defendant's use of a bat during an assault could be used to enhance his sentence for assault resulting in serious bodily injury, even though he was acquitted of the charge of assault with a dangerous weapon.

United States v. Swehla, 442 F.3d 1143 (8th Cir. 2006). While sections of a PSR described defendant's juvenile history in allegedly "inflammatory" terms, defendant did not contend the information was inaccurate nor does the record reflect that any "arguably objectionable portions" affected the sentence imposed.

United States v. Goody, 442 F.3d 1132 (8th Cir. 2006). A sentence outside the guidelines range, and in fact less than half the sentence within the agreed advisory guideline range, was not justified by defendant's situation where he accepted responsibility and provided information, but did not make controlled buys, contribute to the investigation otherwise, or assist in a way which created danger to himself or family. Furthermore, defendant's conduct could not reasonably be compared to that of a co-defendant, a minor participant, as defendant built a secret building on his property to manufacture methamphetamine.

United States v. Adams, 442 F.3d 645 (8th Cir. 2006). A state law conviction for tampering with a motor vehicle was a violent felony for purposes of the career offender enhancement where the defendant's conduct involved "tampering by operation" of the vehicle.

United States v. Levering, 441 F.3d 566 (8th Cir. 2006). Condition of supervised release that defendant not have contact with juvenile females was within the court's discretion in a case involving forcible rape of juvenile female.

United States v. Anderson, 440 F.3d 1013 (8th Cir. 2006). Increase in defendant's sentence after case remanded could not be attributed to judicial vindictiveness where a different judge handled the resentencing, including making specific findings concerning the unusual vulnerability of victims, which was lacking the first sentence.

United States v. Mason, 440 F.3d 1056 (8th Cir. 2006). Defendant's ten prior drug offense convictions involving seven separate criminal episodes required that he be sentenced as a career offender.

United States v. Sherman, 440 F.3d 982 (8th Cir. 2006). Submission of sentencing issues concerning use of a communications facility, status as organizer or leader, possession of a dangerous weapon during the period of conspiracy charged, and drug quantity, given out of abundance of caution while decision on Booker was pending, did not have to be given, but no prejudice occurred because evidence would have been admissible in any event with respect to the charged drug conspiracy; also, sentencing issues were only considered after guilt was determined.

United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006). Co-defendants in a methamphetamine conspiracy case were sentenced by two separate judges, receiving widely disparate sentences for what the circuit viewed as conduct by "remarkably similar participants in the same criminal conspiracy." Both had a relationship with the ringleader of the conspiracy; both were single mothers who made attempts to reunite with their neglected children -- the one on whom the harsher sentence was imposed cooperated with authorities; the defendant who received a substantial departure attempted to obstruct the investigation. Both sentences were vacated and remanded for resentencing.

United States v. Jones, 440 F.3d 927 (8th Cir. 2006). Because sentencing enhancement for age of the victim and repeat sex offender account for different kinds of harms, there was no impermissible double-counting in defendant's 360-month sentence.

United States v. Walker, 439 F.3d 890 (8th Cir. 2006). Sentence of five months in jail and three years supervised release under the 2000 guidelines range for the crime of financial aid fraud was presumptively reasonable, particularly considering defendant could have been sentenced under harsher 2004 guidelines by the terms of her plea agreement.

United States v. Bah, 439 F.3d 423 (8th Cir. 2006). Sentencing court incorrectly sentenced defendant under guideline for trafficking in immigration documents or making a false statement with respect to immigration status of another -- defendant pled guilty to making a material false statement, the conduct for which did not establish the elements of either offense, which would be necessary in order to cross-reference to that guideline.

United States v. Ademi, 439 F.3d 964 (8th Cir. 2006). After pleading guilty to illegal possession of a firearm by an illegal alien and harboring an illegal alien, court's upward departure based on defendant's uncharged assault on an illegal alien employee was proper because the assault was on one of defendant's employees, who defendant harbored and shielded by employing at his restaurant.

United States v. Berni, 439 F.3d 990 (8th Cir. 2006). Booker did not change the circuit's standard of review of sentences involving a section 5K1.1 departure for reasonableness; defendant's prior convictions required application of career offender provisions.

United States v. Hawkman, 438 F.3d 879 (8th Cir. 2006). After pleading guilty to assault with a firearm with intent to do bodily harm and use of a firearm to commit a crime of violence (which resulted in the paralysis of a three-year-old girl following a drive-by shooting), defendant was sentenced to 228 months after the court upwardly departed based on the victim's multiple physical and psychological injuries and defendant's use of alcohol when using the firearm.

United States v. Burns, 438 F.3d 826 (8th Cir. 2006). District court's sixty percent downward departure based on its assessment of promptness and usefulness of defendant's cooperation (immediately upon arrest; included two appearances before the grand jury as a key witness and providing testimony which proved drug quantity against one defendant and led to indictment and plea of another) was not unreasonable.

United States v. Morin, 437 F.3d 777 (8th Cir. 2006). District court properly considered defendant's jailhouse confession as part of the sentencing as the court disbelieved defendant's testimony he had requested an attorney; reliance on tapes of defendant's jailhouse phone calls was also proper as defendant had prisoner's handbook informing him calls would be monitored and there were signs to that effect posted above the phones.

United States v. Olthoff, 437 F.3d 729 (8th Cir. 2006). Because defendant could have used weapons he stole at any time during the burglary he committed to obtain them, the four-level enhancement for felon-in-possession, if used in connection with a felony offense, was correctly applied.

United States v. Sitting Bear, 436 F.3d 929 (8th Cir. 2006). Defendant was not entitled to Rule 32(h) notice of sentencing enhancement as his 228-month sentence was a variance, and not a departure, from the guidelines which does not require notice.

United States v. Sebastian, 436 F.3d 913 (8th Cir. 2006). Because "fast-track" disposition programs existing in certain judicial districts are a statutory creation of the policymakers, the fact that sentencing disparities among defendants in a certain class of cases occurs as a result does not make sentences in those cases in this district (which is not included in the fast-track programs) unreasonable.

United States v. McMannus, 436 F.3d 871 (8th Cir. 2006). Sentences in excess of fifty percent below the low end of guidelines' ranges were unreasonable where one defendant's sentence was reduced solely on her lack of criminal history and no explanation was given for the reduction of the other defendant's sentence.

United States v. Hernandez, 436 F.3d 851 (8th Cir. 2006). Because a five-year term of supervised release did not exceed the statutory maximum authorized by the jury's verdict on the drug charges against defendant, which did not charge a specific drug quantity against defendant, no Apprendi violation arose from drug quantity findings made by the sentencing court.

United States v. Franklin, 435 F.3d 885 (8th Cir. 2006). The court could revoke the conditional release of defendant who had been involuntarily hospitalized on the basis that defendant failed to refrain from violation of the law even though that condition was not part of a "treatment regimen" as contemplated under 18 U.S.C. § 4246(f) because such a condition, here threats to court officers, could be related to the person's mental illness.

G. Habeas

Day v. McDonough, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1071410 (4/25/2006). Because a statute of limitations defense is not jurisdictional, a court is not required to raise the issue *sua sponte*; however, in "appropriate circumstances" it may raise an AEDPA time bar itself: in doing so, the court must give the parties notice and opportunity to brief the issue and determine whether there is prejudice to the petitioner by "delayed focus on the limitation issue."

Moore-el v. Luebbers, ____ F.3d ____, 2006 WL 1098174 (8th Cir. 4/27/2006). Brief which does not directly raise constitutional claims based on allegations of ineffective assistance of counsel does not preserve claims for relief: here instead of arguing counsel was ineffective in failing to call several witnesses, petitioner argued that the various court rulings concerning the witness were an abuse of discretion, which did not preserve his Sixth Amendment claim.

Fults v. Sanders, 442 F.3d 1088 (8th Cir. 2006). BOP regulations which limited inmate placement in a halfway house to the lesser of ten percent of the total sentence of six months, irrespective of consideration of individualized factors under 18 U.S.C. § 3621(b), violated the latter statute.

Weaver v. Bowersox, 438 F.3d 832 (8th Cir. 2006). For purposes of AEDPA exhaustion, a state court's summary disposition of a claim acts as an adjudication on the merits even if its discussion is only cursory.

Rousan v. Roper, 436 F.3d 951 (8th Cir. 2006). In death penalty case, striking three potential jurors for cause, in spite of their statements they could put their personal reservations about the death penalty aside, did not violate defendant's constitutional rights as the trial judge correctly considered the totality of the jurors' responses, not just their single statements.

Walker v. Norris, 436 F.3d 1026 (8th Cir. 2006). Arkansas' petition verification rule was firmly established and strictly enforced by its courts; petitioner's failure to file his post-conviction petition as required by state law within the statutory time period did not toll the one-year statute of limitations of AEDPA.

Bucklew v. Luebbers, 436 F.3d 1010 (8th Cir. 2006). Multiple claims of ineffective assistance claimed in death penalty case, none of which were found to be ineffective.

III. EMPLOYMENT LAW

A. General Issues

Arbaugh v. Y & H Corp, ___ U.S. ___, 126 S. Ct. 1235 (2006). The fifteen-employee threshold under Title VII is held to be nonjurisdictional; it was untimely to raise it defensively after judgment has been entered.

Powell v. Yellow Book USA, ___ F.3d ___, 2006 WL 1071855 (8th Cir. 4/25/2006). In a case involving claims of same-gender sexual harassment by a co-worker and then religious harassment when the same co-worker underwent a religious conversion, neither form of alleged harassment was found not to be severe or pervasive. With respect to the allegation of sexual harassment, the offending co-worker allegedly talked about her own sexual exploits outside the office, described fantasies about co-workers and propositioned plaintiff, the sum of which the circuit determined was insufficient to support a claim. As for plaintiff's religious harassment complaints about the co-worker's attempts to proselytize her, after plaintiff's first complaint the employer admonished the co-worker about further discussion of religious matters. Plaintiff admitted no further religious discussions occurred but unsuccessfully argued that the religious sayings posted in the co-worker's cubicle created a harassing environment.

Box v. Principi, 442 F.3d 692 (8th Cir. 2006). A title change in plaintiff's position resulting from transfer of all persons with plaintiff's job title from Kansas City to Leavenworth, Kansas (when plaintiff did not want to leave KC), which was accompanied with the same salary and benefits, did not qualify as adverse action, nor did denial of the one documented request plaintiff submitted for additional training in the face of 200 hours of training plaintiff received relating to her position.

Bowles v. Osmose Utilities Servs., Inc., ____ F.3d ____, 2006 WL 783378 (8th Cir. 3/29/2006). Even though plaintiff did not request punitive damages in his complaint, punitive damages could be submitted to jury where in a pre-trial disclosure three weeks before trial plaintiff notified defendant of his intent to seek them. Defendant was not surprised by the late disclosure as all the corporate witnesses defendant asserted it would have called in defense of punitive damages actually testified at trial.

B. Disability

Canny v. Dr. Pepper/Seven-Up Bottling Group, 439 F.3d 894 (8th Cir. 2006). Route sales supervisor, whose responsibilities required him to have a driver's license, became legally blind as the result of an untreatable hereditary disease. Evidence that plaintiff could continue to operate a forklift and did so after he left Dr. Pepper showed he could have performed the essential functions of alternative positions or merchandiser and warehouse loader.

Battle v. UPS, 438 F.3d 856 (8th Cir. 2006). Doctor's testimony that plaintiff's depression and anxiety combined to substantially limit his ability to think and concentrate compared to the average person, combined with the testimony of plaintiff and his wife as to how his condition affected his ability to undertake household and financial decisions, was sufficient to submit the issue of plaintiff's disability to the jury.

Samuels v. Kansas City Mo. Sch. Dist. , 437 F.3d 797 (8th Cir. 2006). Medical records from plaintiff's doctor to the effect that her need for a reduced work schedule and physical restrictions would last no longer than six months, coupled with medical opinions from the school district's doctor and an independently retained doctor, were not sufficient to create a genuine issue of material fact as to plaintiff's disability as they evidenced only "general temporary work restrictions."

C. Race

Ash v. Tyson Foods, Inc., 546 U.S. ___, 126 S. Ct. 1195 (2006). This is a *per curiam* decision in a race discrimination case -- the key question whether reference to the plaintiffs (African-Americans) as "boy" was evidence of discriminatory animus was resolved by the Court's determination that "modifiers or qualifications are [not] necessary in all instances to render the disputed term probative of bias;" that "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."

Canady v. Wal-Mart Stores, Inc., 440 F.3d 1031 (8th Cir. 2006). Supervisor's racially derogatory comments, "best classified as 'statements by a decisionmaker unrelated to the decisional process,'" were not linked to the decision to terminate plaintiff's employment; a store co-manager above the supervisor made the decision to suspend plaintiff and the store manager to terminate him.

Ledbetter v. Alltel Corporate Servs., Inc., 437 F.3d 717 (8th Cir. 2006). Evidence of failure to follow company's management guide with respect to reclassification of plaintiff's position after he assumed additional job responsibilities could be used to support an inference of pretext, as could evidence of prompt reclassifications of jobs of other individuals; undertaking new responsibilities without additional pay as an "acting" manager was held to be adverse employment action.

D. Gender

Tenge v. Phillips Modern AG, ___ F.3d ___, 2006 WL 1118545 (8th Cir. 4/28/2006). In a case involving consensual sexual conduct between a female employee and her boss, whose wife became suspicious of their conduct and forced her husband to fire the employee, the reason given by the boss for the termination decision -- that his wife was forcing him to choose between the employee and his marriage -- was not direct evidence of sex discrimination. As for analysis under McDonnell Douglas, on the fourth prong concerning whether male workers involved in the same or similar conduct was disciplined differently, there was no evidence male employees had written sexually explicit notes to the boss or engaged in "mutual consensual physical contact."

Cottrill v. MFA, Inc., ____ F.3d ____, 2006 WL 894963 (8th Cir. 4/7/2006). Plaintiffs' hostile work environment claims to EEOC that male supervisor had been peeping into the women's restroom next to his private breakroom over a several-year period did not encompass disparate treatment claims, which were dismissed as unexhausted. Further, because plaintiffs were not aware of the peeping activities until the peephole was discovered, no hostile work environment claim existed.

Wedow v. City of Kansas City, 442 F.3d 661 (8th Cir. 2006). Fire department's failure to provide its female firefighters with adequately fitting protective gear and changing facilities qualified as adverse employment action and disparate treatment based on sex.

Quick v. Wal-Mart Stores, Inc., 441 F.3d 606 (8th Cir. 2006). Criticism about plaintiff's taking twelve weeks of maternity leave as "a bad management decision" was not direct evidence of discrimination, nor was it shown to be causally related to her termination.

Wilson v. City of Des Moines, 442 F.3d 637 (8th Cir. 2006). In a sexual harassment case, trial court was not required to hold a Rule 412 hearing concerning evidence of plaintiff's sexual behavior or public comments in the workplace -- evidence was properly admitted as an exception under Rule 412(b)(2) to demonstrate why plaintiff's co-workers did not socialize with her and was relevant to issue of whether the alleged harassment was invited.

E. Retaliation

Wallace v. DTG Operations, Inc., 442 F.3d 1112 (8th Cir. 2006). Although a causal connection generally cannot be based on just a temporal connection, the timing of the decision to terminate plaintiff fifteen days after she made a sexual harassment complaint, coupled with comments by the decisionmaker reflecting animus, and "inconsistent application of the policy restricting transfers" (among other evidence), supported an inference of causation in this retaliation case.

Bloom v. Metro Heart Group, 440 F.3d 1025 (8th Cir. 2006). Where employer followed doctor's restrictions respecting plaintiff's carpal tunnel syndrome and its affect on her ability to perform the essential functions of her job as an ultrasound sonographer, there was a valid reason to discharge her from employment and her workers' compensation claim was not shown to be the exclusive cause of the termination of her employment.

F. ERISA

Chronister v. Baptist Health, 442 F.3d 648 (8th Cir. 2006). In the absence of denominational financing or ties, a long-term disability plan could not be considered a "church plan," which plans are not governed by ERISA.

Knieriem v. Group Health Plan, 434 F.3d 1058 (8th Cir.), petition for cert. filed (4/17/2006)(No. 05-1336). After coverage for an allogeneic stem cell transplant was denied under plaintiff's employer-sponsored group health plan, plaintiff brought suit seeking money damages as equitable relief for a claimed breach of fiduciary duty. Plaintiff never received the transplant and died during the lawsuit. His estate claimed that the value of the benefit withheld by denial of coverage qualified as restitution, not as money damages, an argument rejected by the circuit.

Pralutsky v. Metropolitan Life Ins. Co., 435 F.3d 833 (8th Cir. 2006). Denial of long-term disability benefits when plaintiff failed to provide clinical and objective evidence that she suffered from disabling fibromyalgia was not unreasonable under the circumstances of this case. There were conflicting opinions from plaintiff's physicians and the company's independent physician consultant concerning plaintiff's ability to work and only her subjective complaints were provided by the doctors in response to the specific requests.

Lupiani v. Wal-Mart Stores, Inc., 435 F.3d 842 (8th Cir. 2006). In a dispute concerning placement of a union exclusion clause in summary plan description and benefit books, the National Labor Relations Act (NLRA) did not preempt ERISA as plaintiffs' claims concerning the clause did not depend on the act, therefore the court had jurisdiction to consider plaintiff's challenges to the legality of Wal-Mart's conduct in placing the clause in its employee benefits documents.

Parkman v. Prudential Ins. Co. of America, 439 F.3d 767 (8th Cir. 2006). Plaintiff's state law claim for fraud, in which she claimed Prudential directly communicated with her concerning her disability claim even though she had retained an attorney and said she did not need counsel, was preempted by ERISA because it related to administration of plan benefits.

G. FMLA

Rodgers v. City of Des Moines, 435 F.3d 904 (8th Cir. 2006). The circuit holds that emotional distress damages are not recoverable under the FMLA.

H. Miscellaneous

Winskowski v. City of Stephen, 442 F.3d 1107 (8th Cir. 2006). Grievance hearing in closed session with the city counsel concerning criticisms of plaintiff's job performance as sole police officer/chief qualified as a pre-termination name-clearing hearing; therefore, no liberty interest was implicated, particularly where plaintiff did not otherwise seek a hearing before bringing suit.

Simpson v. Merchants & Planters Bank, 441 F.3d 572 (8th Cir. 2006). In an Equal Pay Act case, evidence showed that female plaintiff's job responsibilities as assistant vice president of employer bank were substantially equal to those of male co-employee; jury could have rejected bank's affirmative defense of pay differential based on male's college degree because the skills needed were acquired on the job.

Baum v. Helget Gas Products, Inc., 440 F.3d 1019 (8th Cir. 2006). Summary judgment could not be granted on plaintiff's breach of contract claim where the handwritten contract of employment was ambiguous as to the duration of employment.

Wilson v. Airtherm Products, Inc., 436 F.3d 906 (8th Cir. 2006). Sixty days' prior notice of termination of employment was not required by the Worker Adjustment and Retraining Notification Act (WARN) where buyer of employer's plan initially promised to hire all employees but four days prior to close of sale backed it down to a "substantial number;" sales of a business are excluded from the notice requirement.

IV. CIVIL RIGHTS

A. First Amendment

Hartman v. Moore, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1082843 (4/26/2006). The absence of probable cause for bringing criminal charges must be pled and proved by plaintiff in an action for retaliatory prosecution.

Rumsfeld v. FAIR, ___ U.S. ___, 126 S. Ct. 1297 (2006). Solomon Amendment, which ties requirement of equal access to a university by military recruiters to receipt of federal funds by the university, does not violate the First Amendment as it regulates conduct, not speech.

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, ____ U.S. ___, 126 S. Ct. 1211 (2006). At the preliminary injunction stage, the parties have the same burden of proof as they would at trial; therefore, church did not have the burden of disproving the government's asserted compelling interest in protecting the health and safety of church members and preventing distribution of a hallucinogenic tea beyond church members. Further, the government does not meet its burden under the strict scrutiny test of the Religious Freedom Restoration Act (RFRA) (which is not applicable to state and local governments following City of Boerne v. Flores, 521 U.S. 570, 516 (1997)) by reliance on the prohibitions of the Controlled Substances Act which does not by itself create an exception to proof requirements under RFRA.

La Tour v. City of Fayetteville, 442 F.3d 1094 (8th Cir. 2006). A city ordinance which prohibited businesses from displaying flashing or blinking electronic signs, which the City did not enforce with respect to signs which displayed time/temperature only, was content-neutral on its face and as applied as the one exception was very narrow -- the City's desire to promote traffic safety and preserve aesthetics was not tied to content. Plaintiff could display his messages by other means including through non-electronic signs or ones which did not flash.

Warnock v. Archer, _____ F.3d _____, 2006 WL 861074 (8th Cir. 4/4/2006). School employees who were involved in "almost every aspect" of a claimed "student-organized" baccalaureate ceremony could be held in contempt of the court's ruling which enjoined the school district from "orchestrating or supervising or reciting prayers or other religious messages" at these ceremonies.

Blue Moon Entertainment v. City of Bates City, 441 F.3d 561 (8th Cir. 2006). Because ordinance required plaintiff to obtain a conditional-use permit before opening a nude dance club, trial court should have analyzed the licensing scheme as a prior restraint on plaintiff's First Amendment activity, for which a facial challenge may be brought without first applying for a license, instead of finding absence of irreparable harm because plaintiff had not applied for the permit.

B. Fourth Amendment

Skokos v. Rhoades, 440 F.3d 957 (8th Cir. 2006). Where warrantless seizure of plaintiffs' countertop gaming machines (which did not pay out any winnings, but included poker and blackjack) was based on a prosecuting attorney's reasonable, but incorrect interpretation of Arkansas law, the prosecutor was entitled to qualified immunity on the Fourth Amendment claim against him.

Walker v. Bonenberger, 438 F.3d 884 (8th Cir. 2006). Where officer observed drug transactions taking place in the doorway of a second-floor apartment (which turned out to be one of two unmarked doorways on the second-floor entry) and drug suspect said he lived there, officers had probable cause to search plaintiff's apartment even though it turned out to be the wrong unit, given the physical set-up of the premises; further, that plaintiff was detained for an hour while officers searched her apartment and eventually the correct one of the third floor was not an unreasonable seizure as officers had a valid warrant and plaintiff could have been providing misinformation concerning her knowledge of the third-floor tenant's activities.

C. Fifth Amendment

Hannon v. Sanner, 441 F.3d 635 (8th Cir. 2006). Violation of Miranda safeguards is not actionable under 42 U.S.C. § 1983 -- Miranda is a constitutional rule but not a right equivalent to the Fifth Amendment, the remedy for which would be suppression of evidence, not damages for deprivation of a constitutional right.

D. Equal Protection/Due Process

Jones v. Flowers, ___ U.S. ___, ___ S. Ct. ___, 2006 WL 1082955 (4/26/2006). Due process requires a state to "take additional reasonable steps" to provide notice to a property owner before the property is sold as a result of tax payment delinquencies.

Wilson v. Northcutt, 441 F.3d 586 (8th Cir. 2006). After plaintiff complained that the city had improperly constructed a drainage ditch alongside her property, defendants' subsequent failure to maintain the ditch to prevent further water from flowing on plaintiff's property in the face of plaintiff's legitimate complaints supported an inference of unconstitutional motive.

Creason v. City of Washington, 435 F.3d 820 (8th Cir. 2006). Special assessments for road improvements imposing the same amount per linear foot against every owner who had lots adjacent to the road did not violate Equal Protection; the same amount per foot was assessed against all landowners and all landowners were permitted to offset the value of land they donated for easement; plaintiffs declined the offset offer and sought compensation in condemnation proceedings.

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006). A zoning ordinance which restricted where firearms dealerships could be operated did not violate the Equal Protection Clause of the Fourteenth Amendment -- neither a suspect classification nor a fundamental right was involved and plaintiff provided no evidence that his business was similar to other retail establishments.

E. Eighth Amendment

Plemmons v. Roberts, 439 F.3d 818 (8th Cir. 2006). Where there were factual disputes concerning whether jail officials had been notified by plaintiff of his pre-existing heart condition, whether one defendant was on duty when plaintiff had his heart attack, and how long it took from the time plaintiff notified jailers of his symptoms to the time the ambulance was called, defendants were not entitled to summary judgment on the grounds of qualified immunity.

Drake v. Koss, 439 F.3d 441 (8th Cir.), aff'd on reh'g, ___ F.3d __, 2006 WL 988006 (2006). Relying on a doctor's diagnosis and recommendations that plaintiff's prior suicidal conduct (stabbing himself in the wrist with a pencil and drinking cleaning solution) was "simply manipulative" behavior, jailers' decisions to conduct checks only every 30 minutes, failure to remove bedding and clothing, and failure to fill plaintiff's prescription was not deliberate indifference to the risk he would hang himself.

Vaughn v. Greene Co., Ark., 438 F.3d 845 (8th Cir. 2006). Sheriff had no personal knowledge that pretrial detainee had been sick for several hours, that his anti-depressant medication had run out two-three days before or that the detainee had heart problems putting him at risk for a heart attack, from which the detainee subsequently died; therefore, the sheriff as an individual was not deliberately indifferent.

F. Miscellaneous

Domino's Pizza v. McDonald, ___ U.S. ___, 126 S. Ct. 1246 (2006). This case did not involve a fast-food fight. McDonald, an African-American, was the sole shareholder of a company which had contracts with Domino's. Domino's terminated the contracts and McDonald brought suit on his own behalf under 42 U.S.C. § 1981 claiming the contracts were broken based on racial animus towards him. The Supreme Court affirmed the dismissal of his lawsuit because the contractual relationship was between corporations and not a corporation and an individual, confirming that a corporation is not a person for purposes of the statute.

Wagnon v. Prairie Band Potawatomi Nation, ___ U.S. ___, 126 S. Ct. 676 (2005). A state motor fuel tax imposed on off-reservation distributors to an Indian reservation was nondiscriminatory and did not infringe in the sovereignty of the Indian nation.

Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs. , _ F.3d _____, 2006 WL 987958 (8th Cir. 4/17/2006). In previous litigation in this extended case, the court had previously held certain subsections of Medicaid created enforceable rights under 42 U.S.C. § 1983 -- the attempt to revisit the issue is precluded by the "law of the case doctrine."

Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs. , _ F.3d ___, 2006 WL 987981(8th Cir. 4/17/2006). On separate issues in the above case, court could not grant injunctive relief directing disclosure of physicians who performed peer review even though the regulations concerning peer review materials, which are entitled to deference, preceded enactment of the statute, since the regulations have been changed materially since amendment of the statute.

Bradley v. Ark. Dep't of Education, ___ F.3d ___, 2006 WL 894959 (8th Cir. 4/7/2006). School district sincerely attempted to provide educational benefit to autistic child and IEP's were appropriate under the IDEA: while the district's implementation of portions of the IEP's, such as effective use of software, was not perfect, the lack of perfection did not violate the purposes of the IDEA.

Mershon v. St. Louis University, 442 F.3d 1069 (8th Cir. 2006). Although plaintiff, who was wheelchair-bound and sight-impaired, disputed whether he made threats against a professor, for purposes of summary judgment he did not dispute that a civil rights investigator, to whom he made complaints about the university's lack of accommodation of his disability, sincerely believed a threat had been made and communicated that perception to campus security, who in turn prevented plaintiff from entering the campus the next day.

Sch. Bd. of Independent Sch. Dist. No. 11 v. Renollett , 440 F.3d 1007 (8th Cir. 2006). Plaintiff did receive a free appropriate public education (FAPE) under the IDEA even though his individualized education plan (IEP) did not have a written behavior intervention plan (BIP), which neither federal nor state law required.

M.P. v. Independent Sch. Dist. No. 721 , 439 F.3d 865 (8th Cir. 2006). Disabled student had a claim under Rehabilitation Act against his former school district for failing to protect him from unlawful discrimination arising from school nurse's disclosure that he suffered from schizophrenia, which caused other students to verbally and physically harass plaintiff; he was not required to exhaust administrative remedies as he would under the IDEA and his claims were wholly unrelated to the processes involved under that act.

Saunders v. Farmers Ins. Exchange, 440 F.3d 940 (8th Cir. 2006). Plaintiffs' claims that defendant used unlawful discriminatory underwriting criteria which resulted in denial of homeowners' insurance to minority residents failed as they could not show direct injury, i.e., that they applied for homeowners' insurance and were rejected for a reason related to the criteria claimed to be discriminatory. However, with respect to plaintiffs' premium price discrimination claims, the "filed rate doctrine" did not bar a federal civil rights claim and plaintiffs had standing to seek relief under the applicable federal statutes.

Porter v. Williams, 436 F.3d 917 (8th Cir. 2006). Because a state social worker's handling of the care of a child was governed under a consent decree which mandated specific procedures for placement and monitoring of children, official immunity would apply if the social worker complied with those requirements; a factual dispute about performance under the procedures would preclude a decision on official immunity until the factual dispute was resolved.

V. PRISONER LAW

A. First Amendment

Munson v. Norris, 435 F.3d 877 (8th Cir. 2006). Required participation in a religious program directed at sexual offenders, which included a recitation of the serenity prayer at group meetings, should be reviewed under the Establishment Clause and not the Free Exercise Clause.

B. Due Process

Louis v. Dep't of Corr. Servs. of Nebraska, 437 F.3d 697 (8th Cir. 2006). Due process did not require a penitentiary to allow inmates, rather than prison staff, to sign and seal UA specimens gathered in a program targeted at eliminating drug use in prison.

C. Right to Counsel

Phillips v. Jasper Co. Jail, 437 F.3d 791 (8th Cir. 2006). This case reaffirms the principle there is no constitutional or statutory right to appointed counsel in civil cases, particularly when courts give *pro se* litigants leeway in procedural matters.

VI. BUSINESS LAW

Volvo Trucks N.A. v. Reeder-Simco GMC, ___ U.S. ___, 126 S. Ct. 860 (2006). Unless it can be established that a manufacturer has discriminated among dealers who are competing to resell the product to the same customer, the Robinson-Patman Act does not reach secondary-line price discrimination.

Central Va. Comm. College v. Katz , ___ U.S. ___, 126 S. Ct. 990 (2006). Sovereign immunity does not bar a bankruptcy proceeding to set aside preferential transfers to state agencies.

Buckeye Check Cashing, Inc. v. Cardegna, ___ U.S. ___, 126 S. Ct. 1204 (2006). Where the validity of a contract, not the arbitration clause contained therein, is involved, an arbitrator, and not a court, must determine the issue.

Texaco v. Dagher, ___ U.S. ___, 126 S. Ct. 1276 (2006). A price-fixing agreement between joint venturers is not *per se* unlawful, but rather, is subject to Sherman Act challenge under "rule of reason" analysis; joint venturers are viewed as single firm.

Ill. Tool Works, Inc. v. Ind. Ink, Inc., ___ U.S. ___, 126 S. Ct. 1281 (2006). Rejecting the assumption that ownership of a patent confers market power, the Supreme Court holds that in cases claiming an illegal tying arrangement under the Sherman Act, plaintiff must prove "defendant has market power in the tying product."

State Farm v. Nat'l Research Ctr. for College and University Admissions, 440 F.3d 964 (8th Cir.), op. superseded on reh'g, __ F.3d ___, 2006 WL 1118542 (2006). Business liability policy which covered damages arising from personal injury or advertising injury applied to cover fines and penalties sought by the Federal Trade Commission when FTC and several state attorney generals investigated NRCCUA's undisclosed disclosure of survey data from students to third parties.

VII. MISCELLANEOUS

Ark. Dep't of Health and Human Servs. v. Ahlborn, ___ U.S. ___, _ S. Ct. ___, 2006 WL 1131936 (5/1/2006). State statutory scheme, which required satisfaction of the portion of the state's Medicaid lien which exceeded the portion of a third-party settlement attributed to medical costs out of the remaining proceeds, was unauthorized by federal Medicaid law.

No. Ins. Co. of N.Y. v. Chatham Co., Georgia, ___ U.S. ___, 126 S. Ct. ___, 2006 WL 1071413 (4/25/2006). Counties are not entitled to sovereign immunity under the Eleventh Amendment even if exercising state power as they are not an "arm of the state." The Supreme Court also rejected "a distinct sovereign immunity against *in personam* admiralty suits that bars cases arising from a county's exercise of core state functions with regard to navigable waters."

Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., ___ U.S. ____, 125 S. Ct. 2688 (2005). The FCC's exemption of broadband cable modem companies from common-carrier regulations held to be a lawful construction of the Communications Act.

Dolan v. USPS, ____ U.S. ____, 126 S. Ct. 1252 (2006). Postal exception under the Federal Tort Claims Act addressing loss arising from negligent transmission of mail could not be construed to bar suit following an injury which occurred after a customer tripped over mail left on her porch by a postal employee. The Court determined the statutory exception is meant to apply to damages arising from late- or non-arriving mail.

United States v. Olson, ___ U.S. ___, 126 S. Ct. 510 (2005). In a case claiming negligence of federal mine inspectors caused a mine accident, the sovereign immunity of the United States is only waived where local law would make a "private person," not "state or municipal entity" liable in tort, even where a "uniquely governmental function" is involved.

MGM Studios v. Grokster, ___ U.S. ___, 125 S. Ct. 2764 (2005). Grokster distributed free computer software which permitted users to share electronic files directly, which software Grokster knew could and was being used to share copyrighted movies and video files. The Supreme Court found Grokster liable for the infringing acts of its users, even though the software itself had lawful uses.